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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

CALVARY CHAPEL DAYTON VALLEY

Case No. 3:20-cv-00303-RFB-VCF

Plaintiff,

vs.

STEVE SISOLAK, in his official capacity  
as Governor of Nevada, et al.,

Defendants.

**RESPONSE TO PLAINTIFFS'  
SUPPLEMENT**

Pursuant to this Court's minute order (ECF No. 33), Defendants Steve Sisolak, in his official capacity as the Governor of Nevada and Aaron D. Ford, in his official capacity as Attorney General of Nevada (collectively "Defendants") hereby submit the following response to Plaintiff Calvary Chapel Dayton Valley's ("Plaintiff" or "Calvary") June 4, 2020 supplement.

This response is made and based upon all matters of record herein, the Memorandum of Points and Authorities submitted herewith, and upon such oral arguments as the court may allow at the time of hearing of this matter

DATED this 7th day of June, 2020.

AARON D. FORD  
Attorney General

By: /s/ Craig A. Newby  
CRAIG A. NEWBY (Bar No. 8591)  
Deputy Solicitor General

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

This Court issued the following Order following the filings of Defendants' opposition to the emergency motion for temporary restraining order and preliminary injunction:

If the Plaintiff is seeking *alternative or modified relief beyond that requested in its Emergency Motion for Temporary Restraining Order and Preliminary Injunction* (ECF No. 19). IT IS ORDERED that the Plaintiff must file a supplement to the Motion by June 3, 2020.

ECF No. 33 (emphasis added).

Calvary's "supplement" does not identify "alternative or modified relief." Instead, following an extension for a medical emergency, Calvary submitted a reply brief that submits *thirty-one* new exhibits, including a declaration that seeks to opine on medical and scientific issues. This is improper for a reply brief, much less one that seeks emergency injunctive relief.

In any event, Calvary's supplement does not change the neutral and generally applicability of the emergency directives to similar mass gatherings. It is not the place of Calvary, its counsel, or this Court, to second guess the emergency decisions empowered to the State's elected leaders during this crisis.

Because Calvary has not met its high burden for obtaining injunctive relief, its emergency motion should be denied.

### II. THE DIRECTIVES ARE NEUTRAL AND GENERALLY APPLICABLE

The United States Supreme Court upheld California's temporary restrictions on the number of attendees at religious services. *See South Bay United Pentecostal Church, et al. v. Newsom, et al.* Case No. 19A1044, 2020 WL 2813056 at \*1 (May 29, 2020), attached to the Opposition as **Exhibit B**. When doing so, the Court noted that California's temporary restrictions "apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. *Id.*"

1 Here, Nevada has temporary emergency restrictions on comparable secular  
2 gatherings, each implemented *prior to* the Supreme Court's recent decision. Public  
3 attendance is *prohibited* for all musical performances, live entertainment, concerts,  
4 competitions, sporting events, and any events with live performances. **Ex. A** to the Opp.  
5 at § 22. In short, religious services are being *treated better* than "lectures, concerts, ...  
6 spectator sports, and theatrical performances." "Movie showings," the last comparable  
7 gathering identified by the Supreme Court, are limited to no more than 50 people, no better  
8 than religious services. *Id.* at § 20. Similar restrictions to the lesser of 50 people or 50%  
9 occupancy exist for museums, art galleries, zoos, aquariums, trade schools, and technical  
10 schools to the lesser of 50 people or 50% occupancy. *Id.* at §§ 30, 32. Good cause exists for  
11 the distinction: mass gatherings have a higher risk of COVID-19 transmission than general  
12 commerce.

13 Rather than acknowledge the similarities between the activities identified as  
14 comparable by the Supreme Court, Calvary belatedly attempts to do two things in its  
15 supplement that are outside the scope of what this Court requested. First, Calvary  
16 attempts to argue it should be treated the same as non-restricted gaming licensees or  
17 outraged protestors of George Floyd's death. This is mistaken, as Nevada has rational  
18 reasons for reopening its most highly-regulated industry and for how to address public  
19 unrest.

20 Second, Calvary attempts to substitute its scientific judgment for Nevada's Chief  
21 Medical Officer, through the submission of a medical declaration Calvary could have  
22 submitted when filing its request for emergency relief. The Supreme Court recognizes that  
23 it is not the place of a court to substitute its policy determinations for those of the elected  
24 leaders of Nevada, who are empowered to make difficult, emergency decisions regarding  
25 public safety and are subject to democratic accountability if the People ultimately disagree  
26 with those decisions. *South Bay*, 2020 WL 2813056 at \*1. There is a scientific basis for  
27 Nevada's staged efforts at reopening; Calvary is not entitled to substitute its judgment for  
28 Nevada's elected leaders.

1 For the foregoing reasons, this motion should still be denied.

2 **A. Nevada Gaming Establishments, as Privileged Licensees, are Subject**  
 3 **to Heightened Regulation and Discipline, Justifying Different**  
 4 **Treatment than Faith-Based Organizations**

5 Calvary argues that casinos are being treated better than churches. Supp. at  
 6 2:19-20. Gaming, as the most highly-regulated business industry within Nevada, are being  
 7 treated differently than churches. And for good reason. The right to hold a non-restricted  
 8 gaming license is a privilege. NRS 463.0129(2). Nevada has “strict regulation” of, inter  
 9 alia, persons “related to the operation of licensed gaming establishments...” NRS  
 10 463.0129(1)(c). All places where gaming is conducted are to be “assisted to protect the  
 11 public health, safety, morals, good order and general welfare of the inhabitants of the  
 12 State...” NRS 463.0129(1)(e). Nevada’s legislature described the vital role that gaming  
 13 plays in our State’s economy and to the welfare of its citizens. NRS 463.0129(1)(a).

14 Nevada’s legislature created the Commission and the GCB. NRS 463.022, 030. The  
 15 Commission and the GCB are to administer the provisions of the Nevada Gaming Control  
 16 Act to protect the public interest consistent with Nevada policy. NRS 463.140(1). The GCB  
 17 has “full and absolute power” to recommend to the Commission that a finding of suitability  
 18 be revoked. NRS 463.1405(3). This Commission “has full and absolute power and  
 19 authority” to revoke a finding of suitability. NRS 463.1405(4). This “full and absolute  
 20 power and authority” includes “pursuing disciplinary action to limit, condition, suspend,  
 21 and/or revoke a license, and/or impose a monetary fine against a licensee in accordance  
 22 with the Gaming Control Act” for violation of Directive 021. **Ex. A** to the Opp. at § 35.

23 Here, to reopen, non-restricted licensees were required to submit detailed reopening  
 24 plans for review and approval by the Nevada Gaming Control Board. *See* Health and Safety  
 25 Policies for Resumption of Gaming Operations – Nonrestricted Licensees (May 27, 2020) at  
 26 2, attached hereto as **Exhibit D**. “Nevada Gaming Control Board Agents may be present  
 27 to observe some or all of these procedures.” Policy Memorandum – Procedures for  
 28 Reopening after Temporary Closure due to COVID-19 (Apr. 21, 2020) at 6, attached hereto  
 as **Exhibit E**. More importantly, the Nevada Gaming Commission has full authority to

1 enforce the required reopening plans and related health requirements with its existing  
2 enforcement personnel.<sup>1</sup> See Directive 021 (**Ex. A** to the Opp.) at § 35.

3 In contrast, because religion is a fundamental right, not a privilege, its facilities are  
4 not subject to heightened regulation and enforcement. There is no such corresponding  
5 regulatory agency for religious-specific facilities that can be immediately repurposed  
6 towards enforcing emergency health directives in this context. This is a good thing and  
7 something on which the parties likely agree.

8 Instead, as described in some detail by the Lyon County Sheriff's joinder,  
9 enforcement of Directive 021 is generally left to *local law enforcement*, subject to their  
10 prioritization of resources. As set forth by the Lyon County Sheriff's joinder, enforcement  
11 of Directive 021 is prioritized similarly to other complaints received by citizens for other  
12 alleged incidents. Prioritization of limited resources by law enforcement has led to an  
13 emphasis in certain Nevada jurisdictions on protests against the killing of George Floyd.  
14 Choosing to reopen a highly regulated industry, that is subject to significant regulatory  
15 control that allows for a rapid shutdown if a second COVID-19 outbreak arises, makes  
16 sense. This policy determination warrants deference from a court, as "[o]ur Constitution  
17 principally entrusts '[t]he safety and the health of the people' to the politically accountable  
18 officials of the States 'to guard and protect.'" *South Bay*, 2020 WL 2813056 at \*1 (quoting  
19 *Jacobson*, 197 U.S. at 38).

20 Further, Calvary speculates on the nature of gaming activity today versus what it  
21 was prior to COVID-19, relative to its plan for larger church services. Supp. at 5:1–26. It  
22 ignores the establishment-specific plans each has that has been reviewed and approved by  
23 existing regulatory bodies. It also ignores the lack of time limitation that a religious service  
24 may continue. It also ignores the difference between congregating together with active,  
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26 <sup>1</sup> It also ignores Lyon County, instead relying on pictures of Fremont Street  
27 Experience and a downtown casino. There, the Carson Plains Casino plans on reopening  
28 Saturday, June 6 at 9 a.m. See <https://carsonplainscasino.net/> (last accessed June 5, 2020).  
In any event, regulatory authority over the pictured establishments lies with the Nevada  
Gaming Commission and it would be inappropriate for Defendants to comment on whether  
or what discipline may occur premised on the pictures.

shared communication, versus gaming activities, which now often involve sitting at a socially-distant gaming machine.<sup>2</sup> Here, where “officials ‘undertake [ ] to act in areas fraught with medical and scientific uncertainties,’ their latitude ‘must be especially broad.’” *South Bay*, 2020 WL 2813056 at \*1 (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). “Where those broad limits are not exceeded, they should not be subject to second-guessing by an ‘unelected federal judiciary,’ which lacks the background, competence, and expertise to assess public health and is not accountable to the people.” *Id.* (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985)).

Under these temporary circumstances, Nevada is entitled to deference on its regulated, limited reopening of non-restricted gaming establishments.

#### **B. Calvary’s Policing Priorities are Misplaced and Not Subject to Court Review**

Here, Calvary takes issue with Defendants’ approach to protests arising from the tragic killing of George Floyd. Supp. at 7:1–8:27. These are spontaneous, peaceful protests arising from the public’s outrage at George Floyd’s killing by a police officer, as seen on video. Without dispute, these events have raised serious discussions pertaining to policing and race. In addition to these peaceful protests, others have attempted to co-opt these peaceful protests with acts of violence. A Las Vegas Metropolitan Police officer has been seriously wounded. In Reno, to disperse looting, police were required to use tear gas and other non-lethal methods.

It is in this context that Calvary argues that Defendants’ inability to prevent spontaneous protests or to force local law enforcement to arrest all those who violated Directive 021 implies that Defendants are favoring protestors over church services. Supp. at 9:1–11. This is ridiculous. Defendants, as elected leaders, are attempting to address important community issues while also calming a volatile situation. As noted by the Lyon

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<sup>2</sup> Defendants have already addressed the difference between mass gatherings most similar to religious gatherings versus commerce, including indoor malls and restaurants, which already have some distancing between groups of people already included. They will not repeat themselves here.

County Sheriff, local law enforcement has the right to prioritize how it enforces laws. Here, rather than potentially begetting more protest and potential violence by using police officers to engage in mass enforcement of Directive 021, local law enforcement is emphasizing preserving public safety. Making efforts to maintain a safe community is not a restriction on the content of anyone's expression. Further, as noted in Defendants' opposition, there has been no limitation on Calvary's ability to express its beliefs to its members and through the world. Calvary is only limited on the size of any service, rather than the number of services and the ability to communicate in multiple ways.

In short, the purported refusal to arrest protestors does not constitute a violation of Calvary's First Amendment rights.

### C. Houses of Worship, as a Mass Gathering, Have Higher Risks

Belatedly, Calvary submits a declaration asserting that there is no "scientific or medical reason that a religious service that follows the guidelines issued by the CDC would pose a more significant risk of spreading [COVID-19] than gatherings or interactions at other establishments or institutions." Supp. at 10:6–13. Dr. Flanagan, among his other activities, is a permanent Catholic deacon. See **Ex. 44** to the Supp. at p. 14; see also Smith, Peter Jesser, *Doctor: Keep Calm and Take Practical, Prayerful Action Amid Coronavirus*, NATIONAL CATHOLIC REGISTER (Mar. 4, 2020), a true and correct copy of which is attached hereto as **Exhibit F**.

Nevada's Chief Medical Officer respectfully disagrees, believing that "[i]n-person worship services pose specific risks for disease transmission." Decl. of Ihsan Azzam, Ph.D, M.D., M.P.H., Chief Medical Officer for Nevada (June 7, 2020) at ¶ 22, attached hereto as **Exhibit G** hereto. As stated previously:

When it comes to gatherings, the risk is not just based on how many people there are, but rather *how closely they are gathered and how they are interacting with each other*. The risk does not disappear in smaller gatherings. It's the distance and precautions that will make the difference.

See Social Distancing (last accessed May 27, 2020);

<https://nvhealthresponse.nv.gov/info/event-organizers/> (emphasis added).



1 In any event, Calvary, its counsel, and this Court are not allowed to substitute their  
2 policy judgment for that of elected Nevada officials during this public health emergency.  
3 *South Bay*, 2020 WL 2813056 at \*1. Because there is a public health justification for  
4 Directive 021 during this emergency, the Court should reject Calvary's efforts to substitute  
5 their own policy judgment here.

6 **III. JACOBSON PROVIDES DISCRETION FOR EXERCISING EMERGENCY POWERS**

7 Calvary attempts to distinguish *Jacobson*, without addressing any of the cases faced  
8 by courts throughout the United States affirming its viability to the same issue before this  
9 Court. Supp. at 10:18–12:2. Only in passing does Calvary attempt to rewrite Chief Justice  
10 Roberts' opinion in *South Bay* to be more to its liking, by contorting the comparison between  
11 comparable secular activities for the proposition that it must “not single out rights or  
12 persons for disfavored treatment.” Supp. at 11:19–12:2. *Jacobson*, as recognized by the  
13 Supreme Court in *South Bay*, is the acknowledgement that power to address public health  
14 emergencies lies with state elected officials, not litigants and courts, and that there is  
15 additional deference to state elected officials while addressing these public health  
16 emergencies. *South Bay*, 2020 WL 2813056 at \*1.

17 Here, on a rational basis, Nevada has treated mass gatherings differently than  
18 commerce, including gaming. Under such circumstances, the motion should be denied.

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1 **IV. CONCLUSION**

2 Following scientific evidence and federal guidelines, Nevada has implemented social  
3 distancing to protect Nevadans from COVID-19 to mitigate the risk of exposure and spread.  
4 There is a rational basis for treating religious services the same as other mass gatherings  
5 and differently than commercial activities on a temporary basis.

6 Accordingly, the motion should be denied.

7 Dated: June 7th, 2020.

8 AARON D. FORD  
9 Attorney General

10 By: /s/ Craig A. Newby  
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**CERTIFICATE OF SERVICE**

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 7th day of June, 2020, I electronically filed the foregoing document, **RESPONSE TO PLAINTIFF'S SUPPLEMENT**, with the Clerk of the Court by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Kristalei Wolfe  
Kristalei Wolfe  
State of Nevada,  
Office of the Attorney General

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